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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/106,519	06/29/1998	KEITH MCCLOGHRIE	CIS-044	6843

7590 10/30/2002

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EXAMINER

PHUNKULH, BOB A

ART UNIT	PAPER NUMBER
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2661

DATE MAILED: 10/30/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/106,519

Applicant(s)

MCCLOGHRIE ET AL.

Examiner

Bob A. Phunkulh

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 05 August 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-7 and 9-28 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-7, 10 and 23-28 is/are rejected.
- 7) ☒ Claim(s) 9 and 11-21 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

### **DETAILED ACTION**

This communication is in response to applicant's 8/5/2002 amendment/responses in the application of **McCLOGHRIE et al.** for "**SAMPLING PACKETS FOR NETWORK MONITORING**" filed 06/29/1998. The amendments/response to the claims have been entered. No claims have been canceled. Claims 23-28 have been added. Claims 1-3, 5-7, 9-28 are now pending.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 3-6, 22-24, and 27-28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 3 and 22, please identify the functions for "a packet-type detector" and "a frequency measurement element" as cited in lines 6-7.

#### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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Claims 1 and 2 are rejected under 35 U.S.C. 102(b) as being anticipated by Phaal (US 5,315,580).

Regarding claims 1 and 2, Phaal discloses a network monitoring device includes a receive means for detecting and receiving message packets carried on a network, a sampling means for selecting a number of packets detected by the receive means, and a processing means for collecting and processing data from packets selected by the sampling means (**see col. 1 lines 62 to col. 2 line 39**). It should be note that sampling data packets allows maintaining the monitoring device load constant despite substantial variation in network traffic.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7, 10 and 25-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Phaal in view of Akashi (US 4,500,990).

Regarding claims 7, 10, and 25-26, Phaal discloses a network monitoring device includes a receive means for detecting and receiving message packets carried on a network (*an input port for receiving network packets*), a sampling means for selecting a number of packets detected by the receive means (*a sampling element for selecting a fraction of those packets for review*), and a processing means for collecting and processing data from packets selected by the sampling means; wherein the sampling

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means select packets in a deterministic manner either on the basis of selecting every nth packet or on the basis of selecting the first packet detected after a fixed interval (see col. 1 lines 62 to col. 2 line 39).

In addition, Phaal discloses the size (*threshold*) of the receive and transmit FIFO buffers 25 and 26 can be quite small, for example sufficient to hold only two or three entries (see col. 5 line 66 to col. 6 line 12); and the collected packets sent out by the monitoring devices 12 over the network are all received by the measurement station 13 which stores these packets and carries out subsequent processing and analysis (see col. 6 line 27 to col. 7 line 37).

Furthermore, Phaal discloses the random selection of received packet header is based on the predetermined random counts stored in ROM 22 (see col. 4 lines 57-59). Also, the random numbers may be generated by the processor 21 (see col. 6 lines 30-43).

Phaal fails to disclose a feedback element for adaptively altering a fraction of packets for review that is response to a length of a queue of selected packets.

Akashi, on the other hand, teaches the packet buffer 25 is accompanied by a buffer sensor or control circuit 27, which senses whether or not the packet buffer 25 is still capable of storing an additional part of the selected packets in addition to the part already stored therein. More specifically, the buffer sensor circuit 27 compares the amount of the selected packets stored in the packet buffer 25 with a threshold predetermined relative to the memory capacity of the packet buffer 25. The buffer sensor circuit 27 produces a sensor output signal in which an overflow flag appears

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while the packet buffer 25 is incapable of further storing the additional part. The sensor output signal is fed back to the packet buffer 25 in enabling the packet buffer 25 to store the additional part only during absence of the overflow flag (see col. 5 lines 45-68).

Therefore, it would have been obvious to one having ordinary skill in the art at the time of invention was made to provides the teaching of Akashi in the system taught by Phaal in order to avoid overloading the traffic sampling element by overloading the queue.

#### ***Allowable Subject Matter***

Claims 3-6, 22-24, and 27-28 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, second paragraph, set forth in this Office action.

Claims 9, 11-21, are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Examiner's Remarks***

Claims 1 and 2 are still pending since the Applicant's response to the Office Action filed 3/4/2002 (After Final Amendment) has not been entered.

#### ***Conclusion***

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**Any response to this action should be mailed to:**

Commissioner of Patents and Trademarks

Washington, D.C. 20231

**or faxed to:**

(703) 305-9051, (for formal communications intended for entry)

**Or:**

(703) 308-5403 (for informal or draft communications, please labels

"PROPOSED" or "DRAFT")

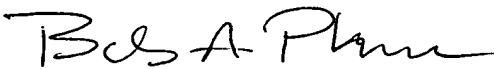
Hand-delivered responses should be brought to Crystal Park II, 2021

Crystal Drive, Arlington, VA., Sixth Floor (Receptionist).

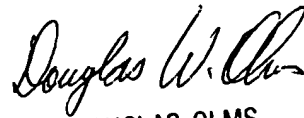
Any inquiry concerning this communication or earlier communications from the examiner should be directed to **Bob A. Phunkulh** whose telephone number is **(703) 308-8251**. The examiner can normally be reached on Monday-Friday from 8:00 A.M. to 4:00 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor **Douglas W. Olms**, can be reach on **(703) 305-4703**. The fax phone number for this group is **(703) 872-9314**.

**Bob A. Phunkulh**



TC 2600  
Art Unit 2661  
October 21, 2002



DOUGLAS OLMS  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 2600